

Discipline and Punish

Pawel Marcisz

2019-12-22T23:32:00

The Polish rule of law saga took yet another turn for the worse. The Parliament is working on a bill to prevent judicial review of the previous judicial reforms as well as to neutralize the effects of adverse CJEU judgments.

Background

It all started on 19 November when the CJEU delivered its judgment in joined cases [C-585/18](#), [C-624/18](#) and [C-625/18](#), regarding independence of the Disciplinary Chamber of the Polish Supreme Court and, by extension, the National Council of the Judiciary. The independence of both bodies was in doubt, chiefly as a result of political interference. The composition of the Council – a constitutional body playing a key role in the appointment of the Polish judges – depends now almost completely on the decision of the Parliament, dominated by the Law&Justice party. The newly created Disciplinary Chamber was elected, in a non-transparent way, by this Council (and then appointed by the President of the Republic). The CJEU decided that it is for the Polish Supreme Court (as the referring court in the cases) to assess whether the Disciplinary Chamber was in fact independent; at the same time the CJEU set out criteria for this assessment.

This outcome is far from ideal from the domestic point of view as the Supreme Court had been asking the CJEU to decide whether the Disciplinary Chamber is independent and a determination by the CJEU would stand better chances of being respected by the Polish government than any decision by the Supreme Court. Hopes for such a determination were especially high after the [opinion of Advocate General Tanchev](#), who proposed to the CJUE to rule that the Disciplinary Chamber failed to meet the requirements of judicial independence due to the political influence exerted on the composition on the National Council of the Judiciary.

And yet, the preliminary ruling is firmly anchored in the traditional division of labour between the courts. While the CJEU delivers an interpretation of EU law, this interpretation is applied by the referring court to specific facts. And the Supreme Court did exactly that. It applied EU law as construed in the preliminary ruling: the judgment of 5 December declared the Disciplinary Chamber unlawful, and denied its jurisdiction. Consequently the panel of the Supreme Court that had asked for a preliminary ruling decided the case on the merits in stead of the Disciplinary Chamber (press release and the judgment [available in Polish](#)).

The Supreme Court judgment reflected a wide consensus of Polish lawyers that the proper application of the preliminary ruling in cases C-585/18 & *al.* inevitably leads to the conclusion that both the Disciplinary Chamber itself and the National Council for the Judiciary that elected its judges do not satisfy EU law requirements for judicial independence. Hence, neither the Disciplinary Chamber nor any other

judges elected by the Council may perform their judicial function, at least as far as cases with an EU element are concerned. In this context, disciplinary cases against judges, entertained by the Disciplinary Chamber, necessarily entail an EU element, as these judges may in turn hear cases with EU elements.

The position taken by the Supreme Court aligns with a broader view that any judges elected by the new National Council of the Judiciary are illegitimate as the Council itself has been taken over by the Law&Justice party: in consequence, any judicial decision taken by these judges is defective. It is only natural that parties to cases heard by such judges would challenge their decisions. On 18 December the Supreme Court, in another case, made a preliminary reference asking, among other questions, whether judges elected by the National Council of the Judiciary satisfied EU law standards of independence (preliminary reference [available in Polish](#)).

Proceedings on the bill

Unsurprisingly, both the Disciplinary Chamber and the National Council of the Judiciary ignored the CJEU ruling in C-585/18 & *al.*, and the government decided to counterstrike. On 13 December Law&Justice introduced a bill on disciplining judges, officially called Bill of Amendment of the Law on the System of Common Courts, the Act on the Supreme Court, and Some Other Acts. Its text is [available in Polish](#). Its main intention was to prevent courts from questioning the legality of the National Council of the Judiciary and validity of its judicial appointments.

The bill was then proceeded in rush, not unlike previous acts reforming the judiciary enacted by the Law&Justice majority. The first reading of the bill on Thursday, 19 December, was followed by the works of the Parliamentary Commission till dawn of Friday, 20 December, and by the final vote of the lower house (*Sejm*) in the afternoon. At present, the bill still needs to be approved by the upper house (Senate) and signed by the President. The Senate, where the opposition holds a scant majority of seats, is going to consider the bill on 8 or 9 January. If it rejects or amends the bill, these decisions may be overruled by the Law&Justice majority on the lower chamber. There are rumours that the President, a staunch Law&Justice partisan, will refer the bill to the Constitutional Court, to verify its legality before signing it. Such a move could boost the President's non-partisan credibility before the looming presidential election, and, at the same time, enhance the dubious legitimacy of the present Constitutional Court.

The public protests against the bill were ignored, as were the previous protests against other statuses dismantling the rule of law. The government enjoys wide, unwithering support and simply does not care about the opposition of the civil society. The only chance to stop the change may be the European Commission's move to the CJEU for interim measures against application of the new law.

Proceedings on the bill were accompanied by the usual innuendo the Polish government uses against judges. Apparently, Poland is under the threat of juristocracy; judges have cast the country into anarchy; they serve the opposition

parties; and some of them are thieves (the favourite argument of the Minister of Justice based on a single case).

Substance of the bill

The bill introduces several measures aimed at preventing judges from applying EU law to challenge previous judicial 'reforms' as well as from criticizing these reform at all. Within the 24 hours when the bill was discussed by the Parliament some amendments were made. At the moment, a consolidated text including these amendments is not available therefore in the summary below I used the text of amendments put forward by the Parliamentary Commission as well as press reports (especially the one from [OKO.press](#)).

In its final version the bill introduces disciplinary liability for judges (1) engaging in any activities hindering the functioning of the judicial system, as well as (2) questioning the validity of judicial appointments or legitimacy of state constitutional bodies. These provisions are aimed at disabling effects of EU law on the National Council of the Judiciary and the judges it elected for the presidential appointment. The judges are also to be liable for engaging in public activity contrary to the principle of judicial independence. Whereas the provision sounds innocent, it is expected to be used against the judges who publicly protest the judicial 'reforms' introduced by Law&Justice.

Any challenges of judicial decisions as taken by unlawfully appointed judges are to be heard by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. This is the second chamber fully manned by the new National Council of the Judiciary and, with all probability, its members are themselves unlawfully appointed. To fully immunize the Chamber from the influence of other, legitimate, chambers of the Supreme Court, it is decided that it will not be bound by their resolutions, whereas its own resolutions will bind the other chambers.

The possibility to challenge the election of judges by the National Council for the Judiciary will be excluded for judges already appointed by the President of the Republic.

The judicial (and prosecutorial) immunity may be waived only by the Disciplinary Chamber of the Supreme Court, the very Chamber whose composition infringes the principle of judicial independence. This provision has been introduced in response to the lower courts refusal to waive immunities of judges prosecuted for their opposition to the judicial 'reforms' introduced by Law&Justice. Remarkably, the disciplinary commissioners prosecuting in these cases are headed by a person appointed by the Minister of Justice. The chief commissioner, and his deputies, will now be able to prosecute all cases they see fit. Moreover, they will be able to appoint deputies in appellate and regional courts.

The bill also strengthens the positions of court presidents and their deputies in the judges' self-governing bodies. The presidents, let us remind, are already appointed by the Minister of Justice. The boards of the courts will be dominated

by the government appointees, the representation of the single judges will be diminished. Any criticism of the new 'reform' by the judges will be thus prevented.

The Supreme Administrative Court will have its Rules of Procedure octroyed by the President of the Republic. Also, the President will have a power to appoint a disciplinary commissioner from among the judges of the Court.

In the initial version of the bill, judges were also subject to liability, should they refuse to apply a statute contrary to the Constitution or international agreements (including the EU treaties), unless the Constitutional Court ruled that a statute is contrary to them. This provision has been dropped. The judges were originally under the duty to report on their activity in the social media, yet this provision has been likewise abandoned. What remains is the duty to report any membership in Associations and Foundations.

Verdict

The provisions in the bill are all designed as an assault on judicial independence. They aim at crushing the opposition against previous illegal reforms among the judiciary. No need to discuss their details: *res ipsa loquitur*.

The bill is blatantly unconstitutional but without a functioning Constitutional Court it does not matter much. It is also contrary to EU law. Not only does it infringe the judicial independence protected under Article 19(1)(2) TEU, but also the principle of primacy of EU law. It is so as the CJEU explained in C-585/18 & *al.* that Polish courts should review the compatibility of the Disciplinary Chamber (as well as the National Council of the Judiciary) with EU law and ignore the Disciplinary Chamber's jurisdiction, should the review turn negative. The new bill prohibits, under the pain of disciplinary sanctions, questioning the validity of judicial appointments, including appointments to the Disciplinary Chamber, even though they may be contrary to EU law. By this, the bill takes away the possibility of giving full effects to EU law and strives to establish supremacy of national provisions over EU law.

